

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

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State of Oklahoma, ex rel. W.W.A. Drew	)	
Edmondson, in his capacity as Attorney	)	
General of the State of Oklahoma and	)	
Oklahoma Secretary of the Environment C.	)	
Miles Tolbert, in his capacity as the Trustee	)	
for Natural Resources for the State of	)	
Oklahoma,	)	05-CV-0329 GKF-SAJ
	)	
Plaintiffs,	)	
	)	
v.	)	<b><u>RESPONSE TO PLAINTIFFS'</u></b>
	)	<b><u>"EMERGENCY" MOTION TO SET</u></b>
Tyson Foods, Inc., Tyson Poultry, Inc., Tyson	)	<b><u>HEARING DATE ON MOTION FOR</u></b>
Chicken, Inc., Cobb-Vantress, Inc., Cal-Maine	)	<b><u>PRELIMINARY INJUNCTION</u></b>
Foods, Inc., Cal-Maine Farms, Inc., Cargill,	)	<b><u>BY THE CAL-MAINE DEFENDANTS,</u></b>
Inc., Cargill Turkey Production, LLC,	)	<b><u>THE CARGILL DEFENDANTS, THE</u></b>
George's, Inc., George's Farms, Inc., Peterson	)	<b><u>GEORGE'S DEFENDANTS, PETERSON</u></b>
Farms, Inc., Simmons Foods, Inc., and	)	<b><u>FARMS, SIMMONS FOODS, &amp;</u></b>
Willow Brook Foods, Inc.,	)	<b><u>WILLOW BROOK FOODS</u></b>
	)	
Defendants.	)	
	)	

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Defendants Cal-Maine Foods, Inc.; Cal-Maine Farms, Inc.; Cargill, Inc.; Cargill Turkey Production, LLC; George's, Inc.; George's Farms, Inc.; Peterson Farms, Inc.; Simmons Foods, Inc.; and Willow Brook Foods, Inc. together offer the Court the following response to Plaintiffs' "Emergency Motion for Status Conference to Set Hearing Date on Its [sic] Motion for Preliminary Injunction," (Dkt. No. 1378). In a nutshell, no emergency exists, and the Court should set a scheduling conference at the Court's convenience in early December, after all parties have had an opportunity to evaluate the time necessary to fully address the motion. In support of this position, the joined Defendants state:

1. Plaintiffs' motion for preliminary injunction presents no emergency and no need for a rush to judgment on the issue of a supposed bacterial "threat" to human health. The amount

of land application of poultry litter in the IRW—land application that the State itself permits and directly regulates—is if anything presently less that it has been in previous years. Plaintiffs have not identified, either in their discovery responses or in their present motion, a single instance in which that application has had any adverse effect on human health, much less any adverse effect resulting specifically from human exposure to bacteria from poultry litter, the subject of their current motion. (See Ex. 1: Pls.’ Mar. 16, 2007 Supplemental Resp. to Def. Simmons Interrog. No. 5: “At the present time, the State has not confirmed the identity of any person who has suffered adverse health effects traceable to water contact in the Illinois River Watershed caused by land application of poultry waste.”)

2. Plaintiffs’ present motion simply repeats the allegations that Plaintiffs made in their complaint two and a half years ago (First Am. Comp. ¶¶ 95-96: Dkt. No. 18-1), and relies on information that Plaintiffs have had for many months. (See, e.g., Feb. 15, 2007 Hr’g Tr.: Dkt. No. 1073 at 183 (representing through counsel, “While it will be supplemented some, [the scientific data is] substantially complete.”). Indeed, the “emergency” Plaintiffs recite to try to justify the instant motion is exactly the same “emergency” that Plaintiffs offered to justify their emergency motion to conduct expedited discovery in February 2006. (See Pls.’ Motion for Leave to Conduct Expedited Discovery: Dkt. No. 210 at 9, ¶ 15 (“The State of Oklahoma’s scientific investigation has revealed that the water in the IRW contains levels of bacteria which pose a danger to human health from primary body contact.”).)<sup>1</sup>

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<sup>1</sup> Compare this assertion to the similar justification Plaintiffs repeat in their present motions: “This large load of poultry waste causes fecal bacteria levels in the rivers, streams and groundwater of the IRW to reach levels that pose substantial and immediate threats to the health and safety of people who use the Illinois River, its tributaries and the groundwater of this basin.” (Pls.’ Emergency Motion: Dkt. No. 1378 at 2, ¶ 2; Pls.’ Motion for Preliminary Injunction: Dkt. No. 1373 at 2.)

3. Plaintiffs' own secretive conduct undercuts any claimed "emergent" character of Plaintiffs' motion. As the Court is aware, attorneys for all parties were assembled before the Court on November 6, 2007, barely a week before Plaintiffs served their motion for preliminary injunction. Ironically, one of the primary issues of discussion at that hearing was the Cargill Defendants' motion to modify the overall scheduling order for the case, a discussion that would have presented an ideal forum for Plaintiffs to raise the issue of a schedule for the preliminary injunction motion that Plaintiffs already knew they were going to bring.<sup>2</sup> Instead, Plaintiffs' attorneys stood mute, barely mentioning even the possibility of such a motion.

4. Rather than addressing a true emergency, Plaintiffs' motions appear intended to effect a *de facto* bifurcation of this case. Plaintiffs seek to try the case on the merits based on an incomplete record by preventing Defendants from conducting necessary discovery and presenting a full defense to Plaintiffs' claims, including the claims made in the motion for preliminary injunction. Recent motion practice resulted in Plaintiffs' admissions that they have no direct evidence that any Defendants committed any of the acts alleged in the Complaint, and that Plaintiffs intend to prove their claims against the individual Defendants largely through expert testimony. Plaintiffs' motion for preliminary injunction reflects this narrow scope of proof, resting almost entirely on the affidavits of nine experts.

5. Plaintiffs had not previously designated any of these nine experts as testifying witnesses. Indeed, with respect to six of the experts, Plaintiffs had not even revealed the existence or identities of the experts. Each expert's affidavit contains only a brief description of

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<sup>2</sup> Indeed, one of Plaintiffs' supporting expert affidavits had already been executed nearly two weeks before the hearing (see Affidavit of Roger L. Olsen (10/26/07): Dkt. No. 1373-18), and three others were executed two days after the hearing. (See Affidavits of Lowell Caneday, Gordon V. Johnson, and Valerie Harwood (all 11/8/07): Dkt. Nos. 1373-5, 1373-17, 1373-19.)

that expert's background, a description of the subject matter comprising the expert's claimed expertise, and a conclusory statement of the expert's opinion on that topic. Plaintiffs have not provided Rule 26 expert disclosures and reports or answers to Defendants' expert interrogatories for any of these experts. Neither Plaintiffs' discovery responses nor the submissions Plaintiffs filed with their preliminary injunction motion include or identify the data underlying the expert's opinion or (in most cases) any information about the method the expert employed in reaching that opinion. Specifically, Plaintiffs have not provided in any form any of the following information required under Rule 26(a)(2)(B):

- a. a complete statement of all opinions to be expressed by each expert witness and the basis and reasons therefor;
- b. the data or other information considered by the witness in forming the opinions;
- c. any exhibits to be used as a summary of or support for the opinions;
- d. a list of all publications authored by the witness within the preceding ten years;
- e. the compensation to be paid for the study and testimony; or
- f. a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

6. Given the sparse information provided by the expert affidavits, Plaintiffs' failure to disclose any underlying data or other information ordinarily provided with expert opinions, and the intervening Thanksgiving holiday weekend, it will take the joined Defendants at least two weeks to make even a preliminary determination of what work they and their experts will need to do to respond to the motion and how much time they will need to conduct that work.

7. A schedule for Plaintiffs' motion for preliminary injunction should include:

- a. A deadline for Plaintiffs to produce proper Rule 26 expert disclosures and expert reports for the nine experts on which Plaintiffs' motion relies;
- b. A schedule for the Rule 26(b)(4)(A)<sup>3</sup> depositions of Plaintiffs' nine experts, accommodating their respective schedules;
- c. A schedule for Defendants to conduct discovery into the multiple new issues raised by Plaintiffs' motion;
- d. A deadline for Defendants' written responses to Plaintiffs' motion;
- e. A hearing date to address threshold legal issues raised by Plaintiffs' motion, including Daubert challenges to the opinions of some or all of Plaintiffs' experts; and
- f. If the hearing on legal issues does not dispose of Plaintiffs' motion, a schedule for an evidentiary hearing at which the parties would present to the Court their respective witnesses and evidence relating to the proposed grounds for the preliminary injunction.

Given these realities, the joined Defendants respectfully suggest that Plaintiffs' request for a January 2008 hearing on their preliminary injunction motion is unrealistic. Defendants will be able to provide more detail and support for this position after they and their experts have had a reasonable opportunity to review the limited expert information provided with Plaintiffs' motion.

8. The joined Defendants respectfully urge the Court to direct the parties to meet and confer in the next two weeks concerning a schedule for the motion, and if necessary, to submit to the Court proposed schedules and supporting materials addressing any issues on which agreement cannot be reached. The Court could then set a conference in early December to hear the parties' respective positions and adopt a schedule. This procedure will allow the parties sufficient time to confer internally and to negotiate with each other concerning a proposed schedule and to make informed and adequately supported submissions to the Court on any areas

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<sup>3</sup> As amended effective December 1, 2007.

of disagreement, and yet would not unnecessarily delay the Court's setting of an appropriate schedule for Plaintiffs' underlying motion.

9. The joined Defendants therefore urge the Court to issue an Order:
- a. Suspending the usual briefing schedule under Local Rule 7.2;
  - b. Directing the parties to meet and confer to try to reach agreement in whole or in part on a schedule for the Court's consideration of Plaintiffs' motion for preliminary injunction;
  - c. To the extent agreement cannot be reached, requiring the parties to submit their proposed schedules and supporting memoranda simultaneously on Monday, December 3, 2007; and
  - d. Setting the issue of a schedule for the motion for preliminary injunction on for conference on a date convenient for the Court.

Respectfully submitted,

Rhodes, Hieronymus, Jones, Tucker & Gable,  
PLLC

BY: /s. John H. Tucker  
John H. Tucker, OBA #9110  
Theresa Noble Hill, OBA #19119  
100 W. Fifth Street, Suite 400 (74103-4287)  
P.O. Box 21100  
Tulsa, Oklahoma 74121-1100  
Telephone: 918/582-1173  
Facsimile: 918/592-3390  
-and-  
Delmar R. Ehrich  
Bruce Jones  
Krisann C. Kleibacker Lee  
FAEGRE & BENSON LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, Minnesota 55402  
Telephone: 612/766-7000  
Facsimile: 612/766-1600

**Attorneys for Cargill, Inc. and Cargill Turkey  
Production, LLC**

/s/ John R. Elrod

(Signed by Filing Attorney with Permission)

John R. Elrod

Vicki Bronson

CONNER & WINTERS, LLP

211 East Dickson Street

Fayetteville, AR 72701

**Attorneys for Simmons Foods, Inc.**

/s/ A. Scott McDaniel

(Signed by Filing Attorney with Permission)

A. Scott McDaniel (Okla. Bar No. 16460)

Nicole M. Longwell (Okla. Bar No. 18771) Philip

D. Hixon (Okla. Bar No. 19121)

MCDANIEL, HIXON, LONGWELL & ACORD,  
PLLC

320 S. Boston Ave., Suite 700

Tulsa, Oklahoma 74103

(918) 382-9200

-and-

Sherry P. Bartley (Ark. Bar No. 79009)

*Appearing Pro Hac Vice*

MITCHELL, WILLIAMS, SELIG,

GATES & WOODYARD, P.L.L.C.

425 W. Capitol Ave., Suite 1800

Little Rock, Arkansas 72201

**Attorneys for Defendant Peterson Farms, Inc.**

/s/ Robert P. Redemann

(Signed by Filing Attorney with Permission)

Robert P. Redemann

Lawrence W. Zeringue

David C. Senger

Perrine, McGivern, Redemann, Reid.

Barry & Taylor, PLLC

P. O. Box 1710

Tulsa, OK 74101-1710

And

Robert E. Sander

Stephen Williams

YOUNG, WILLIAMS, HENDERSON &

FUSILIER

Post Office Box 23059

Jackson, MS 39225-3059

**Attorneys for Cal-Maine Farms, Inc. and  
Cal-Maine Foods, Inc.**

/s/ Randall E. Rose

---

(Signed by Filing Attorney with Permission)

Randall E. Rose

George W. Owens, Esq.

Owens Law Firm, P.C.

234 W. 13<sup>th</sup> Street

Tulsa, OK 74119

-and-

James Martin Graves, Esq.

Gary V. Weeks, Esq.

Bassett Law Firm

P. O. Box 3618

Fayetteville, AR 72720-3618

**Attorneys for George's Inc.**

**And George's Farms, Inc.**

/s/ R. Thomas Lay

---

(Signed by Filing Attorney with Permission)

R. Thomas Lay

Kerr, Irvine, Rhodes & Ables

201 Robert S. Kerr Ave., Suite 600

Oklahoma City, OK 73102

-and-

Jennifer S. Griffin

Lathrop & Gage, L.C.

314 East Hihg Street

Jefferson City, MO 65101

**Attorneys for Willow Brook Foods, Inc.**



## CERTIFICATE OF SERVICE

I certify that on the 19th day of November, 2007, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General  
Kelly Hunter Burch, Assistant Attorney General  
J. Trevor Hammons, Assistant Attorney General  
Robert D. Singletary  
Daniel Lennington, Assistant Attorney General

drew\_edmondson@oag.state.ok.us  
kelly\_burch@oag.state.ok.us  
[trevor\\_hammons@oag.state.ok.us](mailto:trevor_hammons@oag.state.ok.us)  
[Robert\\_singletary@oag.state.ok.us](mailto:Robert_singletary@oag.state.ok.us)  
[Daniel.lennington@oag.ok.gov](mailto:Daniel.lennington@oag.ok.gov)

Douglas Allen Wilson  
Melvin David Riggs  
Richard T. Garren  
Sharon K. Weaver  
Riggs Abney Neal Turpen Orbison & Lewis

doug\_wilson@riggsabney.com  
driggs@riggsabney.com  
rgarren@riggsabney.com  
sweaver@riggsabney.com

Robert Allen Nance  
Dorothy Sharon Gentry  
Riggs Abney

rnance@riggsabney.com  
sgentry@riggsabney.com

J. Randall Miller  
David P. Page  
Louis W. Bullock  
Miller Keffer & Bullock

rmiller@mkblaw.net  
dpage@mkblaw.net  
lbullock@mkblaw.net

William H. Narwold  
Elizabeth C. Ward  
Frederick C. Baker  
Lee M. Heath  
Motley Rice

[bnarwold@motleyrice.com](mailto:bnarwold@motleyrice.com)  
lward@motleyrice.com  
fbaker@motleyrice.com  
[lheath@motleyrice.com](mailto:lheath@motleyrice.com)

### COUNSEL FOR PLAINTIFFS

Stephen L. Jantzen  
Patrick M. Ryan  
Paula M. Buchwald  
Ryan, Whaley & Coldiron, P.C.

sjantzen@ryanwhaley.com  
pryan@ryanwhaley.com  
pbuchwald@ryanwhaley.com

Mark D. Hopson  
Jay Thomas Jorgensen  
Timothy K. Webster  
Sidley Austin LLP

mhopson@sidley.com  
jjorgensen@sidley.com  
twebster@sidley.com

Robert W. George  
Michael R. Bond  
Kutack Rock LLP

robert.george@kutackrock.com  
michael.bond@kutackrock.com

**COUNSEL FOR TYSON FOODS, INC., TYSON POULTRY, INC., TYSON CHICKEN, INC.; AND COBB-VANTRESS, INC.**

R. Thomas Lay  
Kerr, Irvine, Rhodes & Ables

rtl@kiralaw.com

Jennifer S. Griffin  
Lathrop & Gage, L.C.

jgriffin@lathropgage.com

**COUNSEL FOR WILLOW BROOK FOODS, INC.**

Robert P. Redemann  
Lawrence W. Zeringue  
David C. Senger

rredemann@pmrlaw.net  
lzingue@pmrlaw.net  
dsenger@pmrlaw.net

Perrine, McGivern, Redemann, Reid, Berry & Taylor, PLLC

Robert E. Sanders  
E. Stephen Williams  
Young Williams P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**COUNSEL FOR CAL-MAINE FOODS, INC. AND CAL-MAINE FARMS, INC.**

George W. Owens  
Randall E. Rose  
The Owens Law Firm, P.C.

gwo@owenslawfirmmpc.com  
rer@owenslawfirmmpc.com

James M. Graves  
Gary V. Weeks  
Bassett Law Firm

jgraves@bassettlawfirm.com

**COUNSEL FOR GEORGE'S INC. AND GEORGE'S FARMS, INC.**

John R. Elrod  
Vicki Bronson  
Bruce W. Freeman  
Conner & Winters, LLLP

jelrod@cwlaw.com  
vbronson@cwlaw.com  
bfreeman@cwlaw.com

**COUNSEL FOR SIMMONS FOODS, INC.**

A. Scott McDaniel  
Nicole M. Longwell  
Philip D. Hixon  
Joyce, Paul & McDaniel, PC  
Sherry P. Bartley

[smcdaniel@mhla-law.com](mailto:smcdaniel@mhla-law.com)  
[nlongwell@mhla-law.com](mailto:nlongwell@mhla-law.com)  
[phixon@mhla-law.com](mailto:phixon@mhla-law.com)  
[sbartley@mws gw.com](mailto:sbartley@mws gw.com)

Mitchell Williams Selig Gates & Woodyard  
**COUNSEL FOR PETERSON FARMS, INC.**

Michael D. Graves  
Dale Kenyon Williams, Jr.

mgraves@hallestill.com  
kwilliams@hallestill.com

**COUNSEL FOR CERTAIN POULTRY GROWERS**

I also hereby certify that I served the attached documents by United States Postal Service, proper postage paid, on the following who are not registered participants of the ECF System:

C. Miles Tolbert  
Secretary of the Environment  
State of Oklahoma  
3800 North Classen  
Oklahoma City, OK 73118  
**COUNSEL FOR PLAINTIFFS**

Thomas C. Green  
Sidley Austin Brown & Wood LLP  
1501 K Street NW  
Washington, DC 20005  
**COUNSEL FOR TYSON FOODS, INC.,  
TYSON POULTRY, INC., TYSON CHICKEN, INC.;  
AND COBB-VANTRESS, INC.**

s/ John H. Tucker